



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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I—01—08

Attorney Brian J. Desmond
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Corporation Counsel's Office
Oneida County Courthouse
P.O. Box 400
Rhinelander, WI 54501-0400

Re: Proposed Oneida County Ordinance on Aquatic Invasive Species

Dear Attorneys Desmond and Wiensch:

You write to me asking for an informal opinion on whether Oneida County may "regulate the transportation of aquatic vegetation." Specifically, you say that Oneida County is considering enacting a county ordinance prohibiting anyone from transporting between bodies of water an "aquatic invasive species" on a boat, boat trailer, or boating equipment. You ask whether Oneida County may enact such an ordinance.

I conclude that Oneida County may enact an aquatic invasive species ordinance, but only as long as the ordinance does not conflict with state law. Without my reviewing the specific invasive species ordinance that Oneida County seeks to enact though, I cannot determine whether Oneida County may lawfully enact any particular aquatic invasive species ordinance. However, I encourage Oneida County to work with the Wisconsin Department of Natural Resources ("DNR") to coordinate Oneida County's efforts and make them more effective and to avoid conflicting with the state's invasive species prevention and eradication programs.

Your letter cites and quotes from Wisconsin's county "home rule" statute. In most relevant part, that county "home rule" statute reads as follows: "Except as elsewhere specifically provided [by] statute[], the board of any county is vested with all powers of a local, legislative and administrative character, including without limitation because of enumeration, the subject of water . . ." Wis. Stat. § 59.03(2)(a). This broad county "home rule" authority is in addition to all the other authority that a county may have by statute. Wis. Stat. § 59.03(2)(f). *See also* Wis. Const. art. IV, § 22. By plain language in the county "home rule" statute itself, Oneida County's "home rule" authority is "limited only by express language" found elsewhere in the Wisconsin statutes. Wis. Stat. § 59.03(2)(f).

The Wisconsin Supreme Court has construed the Wisconsin statutes giving Wisconsin counties their authority and has concluded that those sections of Wis. Stat. ch. 59 "reflect a

legislative intent to allow county governments to act on matters of local concern in any manner they deem appropriate. Counties have broad authority to direct local matters." *Hart v. Ament*, 176 Wis. 2d 694, 702, 500 N.W.2d 312 (1993).

Oneida County may enact a countywide aquatic invasive species ordinance as long as state law does not preempt it. Oneida County may do so acting under the broad statutory authority that the Wisconsin Legislature has given to counties in local matters. It is irrelevant whether any other state statute or rule also grants Oneida County authority to enact an invasive species ordinance. It is irrelevant because the home rule statute in Wis. Stat. § 59.03(2)(a) already gives Oneida County this authority as long as other state law does not preempt the ordinance.

To avoid state law preemption of an Oneida County invasive species ordinance, each of the following four conditions must be met:

- (1) The Wisconsin Legislature must not have expressly withdrawn the power of a county to act concerning invasive species;
- (2) The ordinance must not logically conflict with any state invasive species statute;
- (3) The ordinance must not defeat the purpose of a state invasive species statute; and
- (4) The ordinance must not violate the spirit of a state invasive species statute.

Jackson County v. State, 2006 WI 96, ¶ 20, 293 Wis. 2d 497, 717 N.W.2d 713 (these four required conditions listed here are paraphrased, not quoted, from *Jackson County*). See also *Mommsen v. Schueller*, 228 Wis. 2d 627, 636, 599 N.W.2d 21 (Ct. App. 1999). If any one of these four conditions required for avoiding state preemption is unmet in a proposed ordinance, Oneida County may not enact that proposed aquatic invasive species ordinance. *Jackson County*, 293 Wis. 2d 497, ¶ 20.

To determine whether Oneida County's invasive species ordinance is preempted by state law, one must first identify Wisconsin's aquatic invasive species statutes and must then review each of those statutes in light of the first of the four conditions listed in the preceding paragraph. The Wisconsin statutes bearing on aquatic invasive species are Wis. Stat. §§ 23.22 (as amended by 2007 Wisconsin Act 20, §§ 660-63), 23.235, 23.24 (as amended by Wisconsin Act 20, § 664), and 30.715. None of these Wisconsin invasive species statutes expressly withdraws the power of a county to act concerning invasive species. Nor do any of the other statutes and administrative rules that you cite in your letter have that effect. See Wis. Stat. ch. 30 (Navigable Waters), Wis. Stat. ch. 33 (Public Inland Waters), Wis. Stat. § 59.692 (Shoreland Zoning). See also Wis. Admin. Code ch. NR 120 (Priority Watershed), Wis. Admin. Code ch. NR 192 (Lake Monitoring), Wis. Admin. Code ch. NR 198 (Aquatic Invasive Species Control Grants). As a

result, Oneida County satisfies the first of the four conditions for avoiding state preemption—nothing in the law expressly withdraws the power of a county to act on invasive species.

Oneida County must also satisfy each of the other three conditions listed above for avoiding state preemption. Thus, the Oneida County ordinance (1) may not conflict with state law (e.g., the ordinance may not prohibit conduct allowed by a state-issued permit), (2) may not defeat the purpose of, and (3) may not violate the spirit of any Wisconsin statute. To determine whether these three conditions are all met, Oneida County must carefully analyze its proposed invasive species ordinance to determine whether these three additional conditions are each satisfied. "[C]ounties must act in conformity with the letter and spirit of statewide law." *Jackson County*, 293 Wis. 2d 497, ¶ 32. See also *County of Milwaukee v. Williams*, 2007 WI 69, ¶ 24, 301 Wis. 2d 134, 732 N.W.2d 770 ("county may not promulgate regulations that are inconsistent with state legislation"); *State ex rel. Ziervogel v. Board of Adjustment*, 2004 WI 23, ¶ 37, 269 Wis. 2d 549, 676 N.W.2d 401 (counties have "statutory home rule . . . but may not exercise that authority in a way that conflicts with legislative enactments of statewide concern that uniformly affect all counties").

As stated above, the Wisconsin statutes bearing on aquatic invasive species are Wis. Stat. §§ 23.22, 23.235, 23.24, and 30.715. I note that Wis. Stat. § 30.715(2) prohibits placing or using a boat, boat trailer, or boating equipment in a navigable water if the person placing or using the boat, boat trailer, or boating equipment "has reason to believe that the boat, boat trailer, or boating equipment has any aquatic plants attached" to it, whether they are native species or nonnative invasive species. This statutory prohibition may address the same concerns that your county wishes to address by its enacting an invasive aquatic species ordinance. If so, Oneida County may wish to consider adopting an ordinance mirroring or nearly mirroring Wis. Stat. § 30.715(2) to avoid any conflict with state law.

A conflict with state law may also arise from a county ordinance being less strict than state law if, for example, the ordinance authorizes an activity prohibited by state law. But a conflict would not result from an ordinance being the same as or stricter than state law as long as it does not prohibit activity that is authorized by state law. For example, Wis. Stat. § 23.24(3) allows introducing a nonnative aquatic plant into a water of the state if it is done under a valid aquatic plant management permit. Such a permit might be issued to a researcher under carefully controlled circumstances. An ordinance prohibiting a permitted activity or prohibiting transporting plants that are being transported under a state permit would conflict with state law. See *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 271 N.W.2d 69 (1978).

Also you should note that the terms "aquatic plant," "invasive aquatic plant," "native," "nonnative," "distribute," "invasive species," and "nuisance weeds" have defined meanings when those terms are used in the statutes cited in this letter. Although an Oneida County invasive species ordinance need not adopt those same statutory definitions, nonetheless, by defining the terms used in the ordinance consistently with the statutory terms, Oneida may avoid some vagueness and confusion.

Finally, I direct you to Wis. Stat. § 23.22(2)(c) (as amended by 2007 Wisconsin Act 20, § 661), which authorizes grants for projects to control invasive species. *See also* Wis. Admin. Code ch. NR 198. According to DNR, "the state will coordinate prevention, control and abatement tasks, developed and implemented as part of [DNR's invasive species] plan, with federal agencies, tribal and *local governments*, organizations and other entities." "Wisconsin's Comprehensive Management Plan To Prevent Further Introductions and Control Existing Populations of Aquatic Invasive Species" (September 2003) (*italics added*), *available at* <http://dnr.wi.gov/invasives/compstateansplanfinal0903.pdf> at p. 19. I encourage Oneida County to investigate this possibility and to investigate other state resources concerning DNR's invasive species program, and I encourage you to seek advice and assistance in adopting an ordinance and pursuing a program to control invasive species in Oneida County. See the DNR website at <http://dnr.wi.gov/invasives/>.

In summary, Oneida County has statutory authority to enact an ordinance prohibiting anyone from transporting between bodies of water within Oneida County an aquatic invasive species. No Wisconsin statute withdraws that authority. But if Oneida County enacts an aquatic invasive species ordinance, state law might still preempt that ordinance. State law preempts an ordinance if the ordinance conflicts with, defeats the purpose of, or violates the spirit of a state statute. Therefore, before Oneida County enacts its own aquatic invasive species ordinance, you must review any proposed Oneida County ordinance carefully to ensure that it satisfies the law on all three of these remaining conditions to avoid state preemption. You may also wish to work with DNR on this as Oneida County proceeds toward enacting its own aquatic invasive species ordinance.

Sincerely,



J.B. Van Hollen
Attorney General

JBVH:PP:msu

c: Attorney Peter Flaherty